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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

HERMET DORALLE TRYIAL,

Defendant and Appellant.

C061441

(Super. Ct. No.
08F03631)

Pursuant to a negotiated agreement, defendant Hermet Doralle Tryial entered a plea of no contest to one count of possession of firearms by a felon (Pen. Code, § 12021, subd. (a)(1)), and the trial court placed defendant on three years' probation subject to several conditions. On appeal, defendant asserts that three of these conditions are unconstitutionally vague and/or overbroad. We agree and modify the conditions accordingly.

DISCUSSION

Given the nature of defendant's claims, we dispense with a detailed description of the underlying offense. According to

the factual basis for the plea, defendant was convicted of a felony offense in 1992 and in 2008 was found to be in possession of two firearms.

The trial court's order of probation included three conditions at issue in this appeal. First, defendant was not to "use, handle or have in his/her possession marijuana, narcotics, dangerous drugs, or controlled substances of any kind, unless lawfully prescribed for the defendant by a licensed physician" (condition No. 3). Second, defendant was ordered "not [to] associate with known or reputed users or sellers of marijuana, dangerous drugs or narcotics, or be in places where narcotics and/or dangerous drugs are present" (condition No. 4). Third, defendant was ordered "not [to] own or possess any dangerous or deadly weapon nor remain in any building or vehicle where any person has such a weapon, nor remain in the presence of any unlawfully armed person" (condition No. 5).

Defendant contends that these three conditions are unconstitutionally overbroad and/or vague because they do not require personal knowledge on his part. We agree.

Because defendant's claims involve pure questions of law, his contentions are properly before us despite the lack of objection in the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-889.)

"A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness.

[Citation.] A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

Defendant contends that condition Nos. 4 and 5 are unconstitutionally overbroad and/or vague because they do not include a personal knowledge requirement on the part of defendant. Instead, they simply prohibit general association with "known or reputed" users or sellers of drugs, and prohibit defendant's presence in places where drugs and weapons are located. The People agree that these two conditions do not pass constitutional muster and we accept this concession. (See *In re Sheena K.*, *supra*, 40 Cal.4th at pp. 890-892; *In re Vincent G.* (2008) 162 Cal.App.4th 238, 245; *In re Justin S.* (2001) 93 Cal.App.4th 811, 816; *People v. Garcia* (1993) 19 Cal.App.4th 97, 102-103.)

When conditions of probation can be modified to correct their constitutional infirmities, courts are empowered to do so. (*People v. Turner* (2007) 155 Cal.App.4th 1432, 1436.) The People suggest, and we agree, that condition No. 4 should be modified to provide that defendant "not associate with persons he knows or reasonably should know are users or reputed users or sellers of marijuana, dangerous drugs or narcotics, or be in places where he knows or reasonably should know that unlawful or unlawfully possessed narcotics and/or dangerous drugs are present." We also agree with the People's proposal that

condition No. 5 be modified to provide that defendant not own or possess any dangerous or deadly weapon nor remain in any building or vehicle where he knows or reasonably should know another person (other than one who is authorized by law to possess a deadly weapon) has such a weapon, nor remain in the presence of any person he knows or reasonably should know is unlawfully armed.

That brings us to probation condition No. 3, which provides that defendant "not use, handle or have in his/her possession marijuana, narcotics, dangerous drugs, or controlled substances of any kind, unless lawfully prescribed for the defendant by a licensed physician." Defendant acknowledges that this condition does not implicate constitutional interests, but he asserts it is nonetheless impermissibly vague.

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' . . . A vague law 'not only fails to provide adequate notice to those who must observe its strictures, but also "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'"" (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

Defendant argues that, absent a personal knowledge requirement, he is "left to uncertain *ad hoc* court determinations as to whether his innocent handling of a host of containers and other objects from friends, without any knowledge of what they might contain, constitutes a probation violation."

He contends that this condition must be modified to include a knowledge requirement similar to that required for condition Nos. 4 and 5.

The People disagree. The People counter that modification is unnecessary "in light of the phrase 'unless lawfully prescribed for the defendant by a licensed physician,' which is currently in the probation condition." This response ignores the essence of plaintiff's claim. The fact that defendant might legally possess a prescribed narcotic has no bearing on whether unknowing handling of other drugs constitutes a probation violation.

The People note that if defendant is charged with a probation violation, he is free to argue that his handling of unlawful narcotics was unknowing. But that is precisely defendant's point: it will be left to an individual court to determine whether the unknowing handling of drugs constitutes a violation of probation condition No. 3. In order to withstand a challenge for vagueness, a probation condition must be precise enough that the court can determine whether the condition has been violated. (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Probation condition No. 3 must be modified to include a knowledge requirement. (See *People v. Freitas* (2009) 179 Cal.App.4th 747, 752.)

DISPOSITION

Probation condition No. 3 is modified to provide that defendant "not knowingly use, handle or have in his/her

possession marijuana, narcotics, dangerous drugs, or controlled substances of any kind, unless lawfully prescribed for the defendant by a licensed physician." Probation condition No. 4 is modified to provide that defendant "not associate with persons he knows or reasonably should know are users or reputed users or sellers of marijuana, dangerous drugs or narcotics, or be in places where he knows or reasonably should know that unlawful or unlawfully possessed narcotics and/or dangerous drugs are present." Probation condition No. 5 is modified to provide that defendant "not own or possess any dangerous or deadly weapon nor remain in any building or vehicle where he knows or reasonably should know that another person (other than one who is authorized by law to possess a deadly weapon) has such a weapon, nor remain in the presence of any person he knows or reasonably should know is unlawfully armed." As modified, the judgment is affirmed.

HULL, J.

We concur:

SCOTLAND, P. J.

NICHOLSON, J.